

## § 301.7701(b)-2

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States or the air space over the United States.

(3) *Current year.* The term *current year* means any calendar year for which an alien individual is determining his or her resident status.

(4) *Thirty-one day minimum.* If an individual is not physically present for more than 30 days during the current year, the substantial presence test will not be applied for that year even if the three-year total is 183 or more days. For purposes of the substantial presence test, it is irrelevant that an individual was not present for more than 30 days in the first or second year preceding the current year.

(d) *Application of section 7701(b) to the possessions and territories—(1) Application to aliens.* Section 7701(b) provides the basis for determining whether an alien individual is a resident of a United States possession or territory that administers income tax laws that are identical (except for the substitution of the name of the possession or territory for the term “United States” where appropriate) to those in force in the United States. If, after the application of section 7701(b) and the regulations thereunder, an alien individual is a resident of the United States and a resident of a United States possession or territory, the principles of § 301.7701(b)-2 (d) (relating to significant contacts maintained by an individual with a foreign country) shall be applied in order to establish that the individual is a resident alien of either the United States or a United States possession or territory, but not both. See § 1.933-1 (a) of this chapter for determining whether an individual (including a U.S. citizen or national) is a bona fide resident of Puerto Rico. See section 931 and the regulations thereunder for the determination of whether an individual (including a U.S. citizen or national) is a bona fide resident of American Samoa.

(2) *Non-application to citizens.* Section 7701(b) does not provide the basis for determining whether a United States citizen or national is a bona fide resident of a United States possession or territory. For example, a United States citizen who is present in a United States possession or territory for 183 days during a calendar year will not

automatically be a “bona fide resident” of that possession or territory. Whether a United States citizen or national is a bona fide resident of a possession or territory is determined under sections 931 through 933 and § 1.935-1 to the extent it remains effective after December 31, 1984.

(e) *Examples.* This section may be illustrated by the following examples:

*Example 1.* B, an alien individual, is present in the United States for 122 days in the current year. He was present in the United States for 122 days in the first preceding calendar year and for 122 days in the second preceding calendar year. In determining his status for the current year, B counts all 122 days in the United States in the current year plus  $\frac{1}{3}$  of the 122 days in the United States in the first preceding calendar year ( $40\frac{2}{3}$  days) and  $\frac{1}{6}$  of the 122 days in the United States during the second preceding calendar year ( $20\frac{1}{3}$  days). The total of  $122+40\frac{2}{3}+20\frac{1}{3}$  equals 183 days. B meets the substantial presence test and is a resident alien for the current year.

*Example 2.* C, an alien individual, is present in the United States for 25 days during the current year. She was present in the United States for 365 days during the first preceding year and 365 days during the second preceding year. The substantial presence test does not apply because C is present in the United States for fewer than 31 days during the current year.

*Example 3.* D, an alien individual, is present in the United States for 170 days during the current year. He was present in the United States for 30 days during the first preceding year and 30 days during the second preceding year. In determining his status for the current year, D counts all 170 days in the United States in the current year plus  $\frac{1}{3}$  of the 30 days in the United States in the first preceding calendar year (10 days) and  $\frac{1}{6}$  of the 30 days in the United States during the second preceding calendar year (5 days). The total of  $170+10+5$  equals 185 days. D meets the substantial presence test and is a resident alien for the current year notwithstanding the fact that he was present in the United States for fewer than 31 days in each of the two preceding years.

[T.D. 8411, 57 FR 15242, Apr. 27, 1992; 57 FR 28612, June 26, 1992; 57 FR 37190, Aug. 18, 1992]

### § 301.7701(b)-2 Closer connection exception.

(a) *In general.* An alien individual who meets the substantial presence test may nevertheless be considered a nonresident alien for the current year

if the following conditions are satisfied—

(1) The individual is present in the United States for fewer than 183 days in the current year;

(2) The individual maintains a tax home in a foreign country during the current year; and

(3) Except as provided in paragraph (e) of this section, the individual has a closer connection during the current year to a single foreign country in which he or she maintains a tax home than to the United States.

(b) *Foreign country.* For purposes of section 7701(b) and the regulations thereunder, the term “foreign country” when used in a geographical sense includes any territory under the sovereignty of the United Nations or a government other than that of the United States. It includes the territorial waters of the foreign country (determined in accordance with the laws of the United States), and the seabed and subsoil of those submarine areas which are adjacent to the territorial waters of the foreign country and over which the foreign country has exclusive rights, in accordance with international law, with respect to the exploration and exploitation of natural resources. It also includes the possessions and territories of the United States.

(c) *Tax home*—(1) *Definition.* For purposes of section 7701 (b) and the regulations under that section, the term “tax home” has the same meaning that it has for purposes of section 162(a)(2) (relating to travel expenses while away from home). Thus, an individual’s tax home is considered to be located at the individual’s regular or principal (if more than one regular) place of business. If the individual has no regular or principal place of business because of the nature of the business, or because the individual is not engaged in carrying on any trade or business within the meaning of section 162(a), then the individual’s tax home is the individual’s regular place of abode in a real and substantial sense.

(2) *Duration and nature of tax home.* The tax home maintained by the alien individual must be in existence for the entire current year. The tax home must be located in the same foreign

country for which the individual is claiming to have the closer connection described in paragraph (d) of this section.

(d) *Closer connection to a foreign country*—(1) *In general.* For purposes of section 7701(b) and the regulations under that section, an alien individual will be considered to have a closer connection to a foreign country than the United States if the individual or the Commissioner establishes that the individual has maintained more significant contacts with the foreign country than with the United States. In determining whether an individual has maintained more significant contacts with a foreign country than the United States, the facts and circumstances to be considered include, but are not limited to, the following—

(i) The location of the individual’s permanent home;

(ii) The location of the individual’s family;

(iii) The location of personal belongings, such as automobiles, furniture, clothing and jewelry owned by the individual and his or her family;

(iv) The location of social, political, cultural or religious organizations with which the individual has a current relationship;

(v) The location where the individual conducts his or her routine personal banking activities;

(vi) The location where the individual conducts business activities (other than those that constitute the individual’s tax home);

(vii) The location of the jurisdiction in which the individual holds a driver’s license;

(viii) The location of the jurisdiction in which the individual votes;

(ix) The country of residence designated by the individual on forms and documents; and

(x) The types of official forms and documents filed by the individual, such as Form 1078 (Certificate of Alien Claiming Residence in the United States), Form W-8 (Certificate of Foreign Status) or Form W-9 (Payer’s Request for Taxpayer Identification Number).

(2) *Permanent home.* For purposes of paragraph (d)(1)(i) of this section, it is immaterial whether a permanent home

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is a house, an apartment, or a furnished room. It is also immaterial whether the home is owned or rented by the alien individual. It is material, however, that the dwelling be available at all times, continuously, and not solely for stays of short duration.

(e) *Special Rule.* An alien individual may demonstrate in one year that he or she has a closer connection to two foreign countries (but no more than two) if he or she satisfies all of the following conditions—

(1) The individual maintains a tax home beginning on the first day of the current year in one foreign country;

(2) The individual changes his or her tax home during the current year to a second foreign country;

(3) The individual continues to maintain his or her tax home in the second foreign country for the remainder of the current year;

(4) The individual has a closer connection to each foreign country than to the United States for the period during which the individual maintains a tax home in that foreign country; and

(5) The individual is subject to taxation as a resident pursuant to the internal laws of either foreign country for the entire year or subject to taxation as a resident in both foreign countries for the period during which the individual maintains a tax home in each foreign country.

(f) *Closer connection exception unavailable.* An alien individual who has personally applied, or taken other affirmative steps, to change his or her status to that of a permanent resident during the current year or has an application pending for adjustment of status during the current year will not be eligible for the closer connection exception. Affirmative steps to change status to that of a permanent resident include, but are not limited to, the following—

(1) The filing of Immigration and Naturalization Form I-508 (Waiver of Immunities) by the alien;

(2) The filing of Immigration and Naturalization Form I-485 (Application for Status as Permanent Resident) by the alien;

(3) The filing of Immigration and Naturalization Form I-130 (Petition for Alien Relative) on behalf of the alien;

(4) The filing of Immigration and Naturalization Form I-140 (Petition for Prospective Immigrant Employee) on behalf of the alien;

(5) The filing of Department of Labor Form ETA-750 (Application for Alien Employment Certification) on behalf of the alien; or

(6) The filing of Department of State Form OF-230 (Application for Immigrant Visa and Alien Registration) by the alien.

(g) *Filing requirements.* See § 301.7701(b)-8 with regard to the statement that must be filed by an alien individual claiming the closer connection exception.

[T.D. 8411, 57 FR 15244, Apr. 27, 1992; 57 FR 28612, June 26, 1992; 57 FR 37190, Aug. 18, 1992; 58 FR 17516, Apr. 5, 1993]

### § 301.7701(b)-3 Days of presence in the United States that are excluded for purposes of section 7701(b).

(a) *In general.* In computing days of presence in the United States, an alien is considered to be present if the individual is physically present in the United States at any time during the day (see § 301.7701(b)-1(c)(2)(i)). However, for purposes of section 7701(b) and the regulations under that section, the following days shall be excluded and will not count as days of presence in the United States—

(1) Any day that an individual is present in the United States as an exempt individual;

(2) Any day that an individual is prevented from leaving the United States because of a medical condition that arose while the individual was present in the United States;

(3) Any day that an individual is in transit between two points outside the United States; and

(4) Any day on which a regular commuter residing in Canada or Mexico commutes to and from employment in the United States.

(b) *Exempt individuals*—(1) *In general.* An exempt individual is an individual who is either a—

(i) Foreign government-related individual as defined in paragraph (b)(2) of this section;

(ii) Teacher or trainee as defined in paragraph (b)(3) of this section;